



**Informal Comments of The Utility Reform Network Regarding Draft Proposal for
Modification of Rules of Practice and Procedure
March 6, 2017**

TURN appreciates the opportunity to present these written comments on the Draft Proposal in advance of the discussion at the Policy and Governance Committee on March 8, 2017. TURN understands that the March 8, 2017 discussion is the beginning of a process that will lead to a formal rulemaking docket to consider specific rule change proposals. Recognizing that the rules to be considered in that rulemaking are still under development, these comments should be viewed as a preliminary attempt at issue-spotting and not TURN's final position on any of the rule changes in the draft proposal. In these comments, TURN will address certain issues raised by the Draft Proposal and, at this point, has focused its review on Items 1-5 in the Draft Proposal. Given the preliminary nature of our analysis, silence on any issue or proposed change should not be construed as final agreement with the Draft Proposal. A TURN representative will attend the March 8, 2017 Policy and Governance Committee meeting and would be happy to answer any questions related to these comments.

General Comments

TURN appreciates the Commission's diligence in implementing SB 215 and recognizes that the Draft Proposal represents a thoughtful effort to implement the many detailed changes in the legislation. Although our comments will focus primarily on concerns with the Draft Proposal, we view the Draft Proposal as an excellent start.

Item 1- Disqualification of Commissioners/ALJs

Time for Filing Motion. TURN strongly disagrees with the proposal that motions for disqualification should be filed "no later than 10 days after the date the party discovered or should have discovered facts set forth in the declaration filed pursuant to this rule." (Rule 9.5(c).) Instead, TURN recommends deleting this language so that the rule directs only that such motions be filed "at the earliest practicable opportunity."

TURN views the 10-day limitation as unrealistic and believes that it would result in unnecessary protective challenges being filed with the Commission. Evidence of bias or prejudice may become available to a party through a series of disclosures that occur over time. While the first such disclosure

could ultimately constitute a fact that demonstrates bias, the party may not be sufficiently convinced to make a motion for disqualification until additional information confirms the initial concern. Under the draft rule, any party even suspecting impermissible bias or prejudice would be obligated to file a motion within 10 days of any relevant disclosure merely to preserve their rights to seek disqualification in the event that additional material comes to light at a later date.

TURN recognizes that current Rule 9.4(c) for ALJ disqualification includes the 10-day deadline, but the Commission should understand that Rule 9.4 will rarely be invoked. Motions for disqualification for cause of ALJs are unlikely because peremptory challenges are allowed for ALJs under Rule 9.2, which provides an automatic way to obtain the reassignment of an ALJ for suspected bias or prejudice. Peremptory challenges are not permitted for commissioners, which means that Rule 9.5 will be the only way to seek the disqualification of a commissioner for bias or prejudice.

Reduction or Waiver of Comments on a Draft Decision Concerning Motions to Disqualify a Commissioner. TURN is concerned that proposed Rule 14.6(c)(9) would allow the Commission to waive or reduce the comment period without any need for a finding that such a waiver is necessary to serve an objective that is more important than allowing interested parties a meaningful opportunity to comment on what could be an extremely important decision. The Draft Proposal posits that resolution of a motion to disqualify a commissioner would unduly delay the proceeding and compromise the Commission's ability to meet the Commission's statutory deadlines. TURN notes that the Commission routinely issues decisions extending deadlines to decide cases and so questions the importance of missing a deadline that the Commission routinely extends. Also, in many instances resolution of such a motion would have no impact on the schedule, such as when the commissioner in question is not the assigned commissioner.

Item 4 – Ex Parte Definitions

“Ex Parte Communications”. In draft Rule 8.1(b), TURN recommends removing the word “may” in the provisions that reference communications at a conference and one-way communications. Under SB 215, those categories of communications are clearly included in the definition of ex parte communications. It is true that, in quasi-legislative cases, such categories of communications may take place without restriction (unless the Commission orders otherwise), but they are still ex parte communications under SB 215.



In draft Rule 8.1(b)(1), TURN recommends clarifying that ex parte communications relate not just to issues in a formal proceeding, but also to issues in an advice letter process initiated pursuant to Commission order in a formal proceeding. This change would clarify an ambiguity under current rules and would ensure that the ex parte rules designed to ensure fairness and disclosure apply in post-decision processes that can sometimes lead to a Commission resolution and raise important and fact-based implementation issues. In any event, it would be useful to clarify an ambiguity under current rules.

In draft Rule 8.1(b)(3), TURN recommends clarifying that the notice of the “public hearing, workshop, or other public forum” must have been provided “to the official service list” associated with the formal proceeding to which the non-procedural issue pertains in order to exempt communication regarding that issue from the definition of “ex parte communication.” TURN assumes this is the intent behind the Draft Proposal’s revision but is concerned that historic ambiguity may still persist without more precision.

“Procedural Matter”. This is an all-important definition. Because communications falling under this definition are effectively exempt from ex parte restrictions, the Commission needs to keep this definition narrow in order to prevent this exception from effectively swallowing the rule. The Draft Proposal’s language is a good start. However, TURN is concerned that controversial procedural requests that could have an extremely important impact on the outcome of a case would be covered by this exception. (Example: A utility opposes ORA’s request to have 6 months to prepare its testimony in response to a utility application and “inquires” of the assigned commissioner in a private phone call whether the commissioner intends to allow ORA to have an inordinate time to prepare its testimony and jeopardize the utility’s ability to meet its financial goals, etc.) To prevent such abuses of the exception, TURN recommends including a proviso along the lines of: “provided that the person making the inquiry reasonably believes the inquiry does not concern a controversial matter or would not prejudice another party.”

Item 5 – Ex Parte Restrictions and Reporting Rights

Disclosure of Prohibited Communications. The following sentence in Draft Rule 8.2(b) – “If a prohibited communication occurs, the interested person shall report it pursuant to Rule 8.3” – should appear in a standalone section, as this requirement is not limited just to adjudication cases. Section 1701.1(e)(3) makes clear that this requirement applies to any ex parte communication that is prohibited

“by this article.”

Reports of Ex Parte Communications. Draft rule 8.3(a)(3) should add the modifier “substantive” before the word “description”, consistent with § 1701.1(e)(3)(A)(iv).

Decisionmaker Notices. Section 1701.1(e)(3)(B) requires decisionmakers to file notices meeting the specified requirements in ratesetting cases and for prohibited communications. The Draft Rules do not contain any provisions related to this new requirement of SB 215. For completeness of the rules and because of interactions between the interested person disclosure and decisionmaker disclosure, it would be useful to include the requirements that apply to decisionmakers in the rules. Notably, many other rules in the Rules of Practice and Procedure include requirements that apply to the Commission.

Interested Person Reports of One-Way Communications. Because one-way communications by decisionmakers are now clearly covered by the ex parte rules, interested persons’ reporting obligations include reporting such communications. For clarity and because interested persons may otherwise be reluctant to report such communications, the rules should make clear that interested persons are required to report one-way decisionmaker communications that occur in adjudicative cases (which are prohibited) and ratesetting cases, as well as any other prohibited one-way decisionmaker communications (e.g, a decisionmaker communication regarding which ALJ may be assigned to a case). Such reports should include all the elements required by §1701.1(e)(3)(A), which do not include what the decisionmaker said. So essentially the interested person’s report would include the fact that a communication occurred and identify the topic and proceeding number but not indicate the statements or content that came from the decisionmaker. However, decisionmakers should provide “a brief description of the communication” in their reporting. §1701.1(e)(3)(B)(iv).

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